87-711

Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

In re:
ROXANNE MANKIN, FDBA
THE ROXANNE MANKIN CO., INC.,
Debtor.

G. B. MUNN, aka BRUCE MUNN,
Petitioner,

vs.

CHARLES DUCK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the exercise of jurisdiction by the bankruptcy court over a fraudulent conveyance action brought by the trustee in bankrupcty under 11 U.S.C § 544(b) without the right to *de novo* review is unconstitutional under the holding of the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

LIST OF PARTIES

The parties to the proceedings below are all named in the caption.

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VS.

CHARLES DUCK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, G. B. MUNN, aka BRUCE MUNN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, rendered in the above-entitled proceeding on July 27, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has been reported at 823 F.2d 1296 (9th Cir. 1987). It is reprinted in Appendix A hereto, pp. A1-32, *infra.*

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit, affirming the order of the district court and remanding this case to the bankruptcy court for further proceedings, was rendered on July 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of Article III of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 1334 of Title 28, United States Code, provides in pertinent part as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district court shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Section 157 of Title 28, United States Code, states, in part, as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under Section 158 of this title.
>
> (2) Core proceedings include, but are not limited to
>
> • • • •
>
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
>
> • • • •
>
> (3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

Subsection (b) of Section 544 of Title 11, United States Code, provides as follows:

> The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred

by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

STATEMENT OF THE CASE

A. Summary of the Trustee's Complaint

This is an action brought by the trustee in bankruptcy, respondent herein, to avoid an alleged fraudulent conveyance made by the Chapter 7 debtor, ROXANNE MANKIN (MANKIN) to the defendant and petitioner herein G. B. MUNN (MUNN). The facts alleged in the complaint are that in October, 1982, the debtor entered into a written assignment agreement with MUNN in which she agreed to transfer her right to receive profits as a general partner in Capitola Investors, a limited partnership, in exchange for MUNN's promise to co-sign and guarantee a loan needed to refinance real property owned by Capitola. The trustee alleges that MUNN'S promise to co-sign the loan was not fair consideration, that the assignment was made while the debtor was insolvent or rendered her insolvent and that the assignment was made with the intent to hinder, delay or defraud creditors.

In October, 1983, more than one year from the date of the assignment, MANKIN filed her Chapter 7 petition herein. Because more than a year had elapsed between the filing of the debtor's petition for relief, the trustee could not prosecute his fraudulent conveyance claim pursuant to rights created by federal law [11 U.S.C. § 548] which prescribes a one-year statute of limitations but instead had to prosecute said claim pursuant to rights created by state law [11 U.S.C. § 544] under which a three-year statute of limitations applies. [California Code of Civil Procedure § 338(4)].

B. Procedural History of the Case

MUNN specially appeared by moving to dismiss the adversary proceeding on the ground that the Court had no jurisdiction of the trustee's complaint to avoid fraudulent conveyance. By its order dated May 22, 1985, the bankruptcy court granted MUNN'S motion to dismiss. The Court ruled in its written order that since the trustee's claim to avoid fraudulent conveyance could not be brought in the federal court absent the bankruptcy (because it is a claim for relief based on rights created exclusively under state law), the Bankruptcy Court lacks jurisdiction to adjudicate the claim. Following the entry of that order, the trustee filed his motion for reconsideration which was heard by the Court on July 17, 1985. Said motion for reconsideration was denied on July 25, 1985, and the trustee appealed the bankruptcy judge's order dismissing his complaint to the United States District Court for the Northern District of California.

After briefing and oral argument by the parties, the District Court reversed the order of dismissal and remanded the case to the Bankruptcy Court with instructions to exercise jurisdiction. Noting that it was a difficult question, the District Court ruled that the Trustee's action to avoid fraudulent conveyance brought pursuant to 11 U.S.C. § 544(b) is a core proceeding as that term is used in 28 U.S.C. § 157(b)(2)(H) because "the manner in which the rights of debtors and creditors are adjusted" are federally created "public" rights as distinguished from state created private rights. The District Court's order was entered on February 13, 1986. On March 12, 1986, petitioner appealed the ruling of the District Court to the United States Court of Appeals for the Ninth Circuit.

C. The Ruling of The Ninth Circuit Court of Appeals

On July 27, 1987 the Court of Appeals for The Ninth Circuit, in a reported opinion, held that an action brought by a bankruptcy trustee under 11 U.S.C. § 544(b) to avoid a fraudulent conveyance is a "core" proceeding which Congress intended bankruptcy courts to hear and determine pursuant to 28 U.S.C. § 157(b) and that the exercise of jurisdiction over such actions by bankruptcy judges who serve without life tenure or protection against salary reduction does not violate Article III of the Constitution.

REASONS FOR GRANTING THE WRIT

This controversy does not concern the trustee's power to litigate a fraudulent conveyance action. Rather, the issue presented deals with the power of the bankruptcy court to adjudicate a state fraudulent conveyance action subject only to ordinary appellate review.

I

Marathon Precludes the Exercise of Jurisdiction by the Bankruptcy Court Over the Trustee's Fraudulent Conveyance Action Absent Article III *de novo* Review

This Court's decision in *Northern Pipleline Const. Co. v. Marathon Pipe Line Co.,* (1982) 458 U.S. 50, 73 L.Ed.2d 598, 102 S.Ct. 2858, sets forth the fundamental guidelines to be applied in determining the subject matter jurisdiction of the bankruptcy court. *Marathon* tells us that Congress enjoys substantial discretion to prescribe the manner in which federally created rights may be adjudicated, including the assignment to an adjunct or administrative agency of some functions historically performed by judges. Thus, it would seem that the bankruptcy court

could exercise judicial functions in adjudicating rights created undcer Title 11.

When rights created under state law are at issue, however, Congress' authority to control how those rights may be adjudicated is at a minimum. *Marathon, supra*, 102 S.Ct. at 2878. In *Marathon,* this Court held that the delegation by Congress to the bankruptcy courts of jurisdiction over not only traditional matters of bankruptcy but over "all civil proceedings arising under Title 11 or arising in or *related to* cases under Title 11" constituted an impermissible encroachment upon the powers accorded to the judiciary under Article III of the Constitution. *Marathon, supra,* 102 S.Ct. at 2879-2880.

The facts of *Marathon* are simple. Northern Pipeline filed a petition in bankruptcy under Chapter 11. It then commenced an adversary proceeding in the bankruptcy court asserting purely state law claims for breach of contract and misrepresentation against Marathon Pipe Line Company. Marathon moved to dismiss the suit on the ground that the Bankruptcy Act conferred Article III status on bankrupcty judges who lacked life tenure and protection against salary reduction. In affirming the district court's order dismissing the suit, this Court distinguished the adjudication of public rights from the adjudication of state created private rights. While the restructuring of debtor-creditor relations was considered to be a public right, Northern's state law claims against Marathon to bring property into the estate were viewed as being independent and antecedent to the Chapter 11 petition, and hence were not found to be integral to the restructuring of debtor-creditor rights.

Because a majority of the justices could not agree on a formula or test for applying the public rights doctrine in every case, the Court's holding in *Marathon* stands only for the proposition that Congress may not assign to an

Article I court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. In reaching this result the following factors were found to be determinative: (1) Northern's suit involved traditional common law claims arising entirely under state law; (2) no federal rule of decision provided for any of the issues in the lawsuit; (3) no method of adjudication was provided other than the traditional common law mode of judge and jury; and (4) the lawsuit was before the bankruptcy court only because Northern happened to file a petition for reorganization in that court. *Marathon, supra* at 2881.

II

State Law Claims to Bring Property into the Bankruptcy Estate of the Debtor are not Integral to the Restructuring of Debtor-Creditor Rights

In the case at bench, the trustee seeks to bring property into the estate of the debtor by setting aside a fraudulent conveyance. The trustee could not bring the action but for the existence of California law which prescribes a three year statute of limitations. His claim, therefore, is and must be based on state law. There is no practical difference between what the trustee attempts to accomplish in the present case from Northern's suit against Marathon. Using the criteria referred to above, both actions involve traditional common law claims which arise entirely under state law. Federal law is neither relevant nor applicable to the resolution of either dispute. There is no prescribed method for the adjudication of either lawsuit other than the common law mode of judge and jury. Both are actions which have as their sole purpose to bring property into the estate of the debtor. Lastly, neither case would be

heard in the bankruptcy court but for the fact the debtors filed their petitions in that court.

Neither the debtor in *Marathon* or the trustee in this case were precluded from prosecuting their actions in either state court or federal district court. Because the trustee's state law fraudulent conveyance action necessarily requires an adjudication of state created private rights, it cannot be heard by a non-Article III bankruptcy judge. Since Congress may not delegate the adjudication of rights not created under Title 11 to a non-Article III adjunct without *de novo* review by an Article III court, the bankruptcy court may not adjudicate the trustee's state law fraudulent conveyance claim subject only to ordinary appellate review.

III

Article I Courts Lack Jurisdiction to Adjudicate Traditional State Law Claims Absent the Consent of the Litigants Where the Right at Issue is Not Central to the Regulatory Scheme Designed by Congress.

In *Thomas v. Union Carbide Agricultural Products Co.*, (1985) 473 U.S. 568, 87 L.Ed.2d 409, 105 S.Ct. 3325, this Court elaborated on its discussion of the public rights doctrine when it again considered the extent to which Congress may delegate traditional judicial functions to a non-Article III tribunal and limit the scope of appellate review of the judgments and orders of that tribunal. The essence of *Thomas* is that the Constitution does not require every *federal* question arising under federal law to be tried in an Article III court. *Thomas, supra,* 105 S.Ct. at 3334. The Court held that it is necessary to examine both the origin of the right at issue and the concerns guiding the selection by Congress of a particular method for resolving disputes in order to ascertain the amount of

judicial involvement required by Article III. *Thomas, supra,* 105 S.Ct. at 3336.

Thomas involved a challenge to the binding arbitration provisons of The Federal Insecticide, Fungicide and Rodenticide Act, (FIFRA) which requires manufacturers, as a precondition for registering a pesticide, to submit research data to the Environmental Protection Agency (EPA) concerning the product's health, safety and environmental effects, and authorizes EPA to use the data in considering the application for registration of a similar product by a "follow on" registrant. FIFRA authorizes EPA to consider the research data only if the follow on registrant has offered to compensate the original registrant for use of the data and provides for binding arbitration if the manufacturers cannot agree on compensation. FIFRA further provides that the arbitrator's decision shall be subject to judicial review only for fraud, misrepresentation or other misconduct.

This Court upheld FIFRA's binding arbitration provisions because: (1) the right to compensation was considered not to be a purely private right but was a public right in that it was an integral part of a regulatory scheme designed to safeguard the public health; (2) Congress had a legitimate purpose in selecting binding arbitration as the mechanism for resolving compensation disputes in light of the litigation logjam that threatened the efficacy of the pesticide registration program and constituted a potential danger to the public health; (3) the arbitration scheme was deemed necessary as a pragmatic solution to the difficult problem of allocating the costs of generating adequate information regarding the safety, health and environmental impact of a potentially dangerous product; and (4) the participants in the program did so voluntarily. *Thomas, supra,* 105 S.Ct. at 3337-38.

Unlike the follow on registrant in *Thomas,* petitioner herein has not consented to the summary jurisdiction of the bankruptcy court with the concomitant loss of his right to a jury trial guaranteed under the Seventh Amendment of the U.S. Constitution. Unlike the follow on registrant in *Thomas,* the trustee has other forums in which to have his claim adjudicated. And, most importantly, unlike *Thomas,* in which the right to compensation is a federally created right, the origin of the right that the trustee seeks to enforce is found exclusively in state law because, but for the existence of California's fraudulent conveyance statute and its three year limitations period, the trustee's action would be time barred.

IV

The Ninth Circuit's Ruling Extends the Public Rights Doctrine to Include Not Only Federally Created Rights but Rights Created Under State Law That Are Substantially Similar to Federally Created Rights

The Ninth Circuit interprets this Court's holding in *Marathon* as providing for three exceptions to the general rule that federal judicial power is to be exercised only by Article III judges. These exceptions involve (1) cases in which the non-Article III decision maker acted as an "adjunct" to an Article III court, (2) the adjudication of federally created "public rights" and (3) the adjudication of state created rights which are substantially similar to federally created rights. *In re Mankin,* 823 F.2d 1296, 1302 (9th Cir. 1987). Petitioner concedes that under the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) the essential attributes of judicial power are retained by the Article III courts over non-core matters because the parties are entitled to have the district court review *de novo* the proposed findings of fact and conclusions of law submitted by the bankruptcy

judge. 28 U.S.C. § 157(c)(1). The issue thus presented is whether a trustee's fraudulent conveyance action based entirely on state law is a public right (a core matter) that can be heard and determined by a non-Article III judge subject only to ordinary appellate review.

By holding that a fraudulent conveyance action brought under state law is a core proceeding, the Ninth Circuit has denied petitioner the right to a trial *de novo* in the district court under the adjunct court exception. In effect, the Ninth Circuit has held that because California's fraudulent conveyance statute is similar to the fraudulent conveyance statute enacted by Congress, the rights to be vindicated under the state statute are "public rights" that may be adjudicated by non-Article III judges.

The Ninth Circuit justifies its holding that the trustee's state law fraudulent conveyance action is a public right on the following grounds:

> (1) Although the trustee's action is based on state law, Congress has determined that actions to set aside, avoid or recover fraudulent conveyances are core proceedings;
>
> (2) The trustee is acting pursuant to his duties under federal law to gather property into the estate to facilitate the restructuring of debtor-creditor relations; and
>
> (3) The trustee's fraudulent conveyance action is closely linked to the bankruptcy scheme designed by Congress because such actions can only exist if the conveyor is insolvent or about to become insolvent. *In re Mankin, supra*, at 1307.

Despite these distinctions, Petitioner contends that the public right component of the trustee's complaint to avoid fraudulent conveyance is no greater than any public right to be vindicated by the debtor in *Marathon*. Both cases

involve disputes concerning the liability of one party to another under state law. The underlying objective in each case is the same: to bring money or property into the estate of the debtor. The fact that Northern is a debtor in possession under Chapter 11 is immaterial because a judgment in favor of a debtor in bankruptcy will benefit creditors of the estate regardless of whether the debtor's petition is filed under Chapter 7 or Chapter 11 of the Bankruptcy Code. The Ninth Circuit's assertion that Northern's suit was not on behalf of creditors ignores the fact that much like the Trustee in this case, a debtor-in-possession is a fiduciary for all of its creditors and that a recovery will most certainly impact Northern's ability to pay its creditors.

The Ninth Circuit also attempts to distinguish the present case from *Marathon* by stating that Northern's suit could have been brought whether or not Northern was bankrupt whereas the trustee's suit herein could only be brought if the debtor/conveyor is insolvent. But the rights asserted by the trustee under Section 544(b), by definition, are rights that could be exercised by any unsecured creditor of the debtor in the absence of the bankruptcy. The trustee's right to bring such an action on behalf of all creditors arises solely because the insolvent entity has filed bankruptcy. The mere fact that the debtor filed bankruptcy in this case should not be held to convert what otherwise would have been a dispute over state created private rights into a "public" right because the state law in question is similar to a federal statute or serves the same objective.

BAFJA does not define the term "core proceeding." Instead, 28 U.S.C. § 157(b)(2) sets forth a non-exclusive list of proceedings that Congress deemed to be core proceedings. Although 28 U.S.C. § 157(b)(2)(H) designates actions to recover fraudulent conveyances as

core proceedings, the statute is silent as to whether core proceedings include both federal and state actions. Petitioner contends that 28 U.S.C. § 157(b)(2)(H) is unconstitutional to the extent it provides for jurisdiction in the bankruptcy court over state fraudulent conveyance actions without *de novo* review by an Article III court.

Petitioner acknowledges that not all actions involving matters of state law are outside the scope of the bankruptcy court's subject matter jurisdiction. Petitioner recognizes that the determination whether a particular proceeding is a core proceeding shall not be made solely on the basis that the outcome may be affected by state law. 28 U.S.C. § 157(b)(3). For example, a proceeding to determine the validity of a state law claim against the debtor's estate is a core proceeding because such a determination goes to the heart of the restructuring of debtor-creditor rights and because the claimant has consented to the jurisdiction of the bankruptcy court by filing a proof of claim. At the same time, BAFJA must be interpreted in light of this Court's holding in *Marathon*. The Ninth Circuit's holding that Section 157(b)(2)(H) empowers a non-Article III bankruptcy judge to adjudicate actions to bring property into the debtor's estate predicated on rights created exclusively under state law without Article III *de novo* review is in direct conflict with the holding in *Marathon*.

CONCLUSION

Congress, through BAFJA has enumerated specific proceedings, designated core proceedings, in which non-Article III bankruptcy judges may exercise traditional judicial functions including the power to enter final judgments. It is undisputed that core proceedings include actions where the right to relief is specifically created by Title 11.

Although 28 U.S.C. § 157(b)(2)(H) designates actions to recover fraudulent conveyances as core proceedings, the statute is silent on whether core proceedings include the federal action, state actions or both.

The statute must be interpreted in light of the constitutional limitations on the exercise of the bankruptcy court's jurisdiction enunciated in *Marathon* and refined in *Thomas*. Congress may not delegate to non-Article III bankruptcy adjuncts the power to adjudicate state created private rights subject only to ordinary appellate review without violating the separation of powers doctrine embodied in Article III of the Constitution.

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HAAS & NAJARIAN

LOUIS N. HAAS
Counsel of Record
Attorneys for Petitioner
G. B. Munn

APPENDIX A

No. 86-1804

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:
ROXANNE MANKIN, FDBA THE
ROXANNE MANKIN CO., INC.,
Debtor.

CHARLES DUCK, Trustee,
Plaintiff-Appellee,

vs.

G. B. MUNN, aka BRUCE MUNN,
Defendant-Appellant.

BAP No. CV 85-6510-WHO
OPINION

Argued and Submitted
March 13, 1987 — San Francisco, California

Filed July 27, 1987

Before: Charles M. Merrill, and John T. Noonan, Jr.,
Circuit Judges, and Laughlin E. Waters,*
Senior District Judge.

Opinion by Judge Waters

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

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*Honorable Laughlin E. Waters, Senior United States District Judge, Central District of California, sitting by designation.

SUMMARY
Bankruptcy/Jurisdiction

Appeal from a holding that the bankruptcy court has jurisdiction over a trustee's action to set aside an alleged fraudulent conveyance by a Chapter 7 debtor. Affirmed.

Appellee Charles Duck (the trustee) is the trustee in a Chapter 7 bankruptcy case. Alleging that the debtor fraudulently conveyed certain rights to appellant G. B. Munn (Munn), without fair consideration, while the debtor was insolvent, and with the intent to hinder, delay or defraud creditors, the trustee filed an action in the bankruptcy court to have the conveyance set aside. Munn filed a motion to dismiss, alleging that adjudication by the bankruptcy court of the trustee's action would violate Article III of the Constitution. Accepting this position, the bankruptcy court granted the motion. The district court reversed, and Munn appeals.

[1] 28 U.S.C. § 157(b)(1) provides for bankruptcy court jurisdiction over core proceedings, which in section 157(b)(2)(H) are deemed to include fraudulent conveyances. A proceeding under 11 U.S.C. § 548, which authorizes a trustee to set aside fraudulent conveyances made within one year of the filing of a bankruptcy petition, is unquestionably the type of proceeding referred to in section 157(b)(2)(H). The trustee here, however, seeks relief under 11 U.S.C. § 544(b), which gives the trustee the power to avoid any conveyances that an unsecured creditor could avoid under applicable state law. Although Munn argues that the section 157(b) grant of jurisdiction to the bankruptcy court must cover only the federal fraudulent conveyance action codified in 11 U.S.C. § 548 and not a state fraudulent conveyance action [2] section 157(b)(2)(H) does not require that construction, and [3] there is no evidence that Congress intended to re-

strict bankruptcy court jurisdiction to only federal fraudulent conveyance actions.

[4] The question of what bankruptcy proceedings can and cannot be committed to the jurisdiction of a non-Article III bankruptcy judge was comprehensively addressed by the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). [5] The plurality opinion in *Northern Pipeline* held that Congress may not vest in a non-Article III court the power to adjudicate a traditional contract action arising under state law, without the consent of the litigants. [6] In response to *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeships Act of 1984, which is the statutory scheme under which the claim here arises.

[7] There are several distinctions between this case and *Northern Pipeline* that are relevant to the consideration of whether the bankruptcy jurisdiction at issue in this case comes within either the public rights or adjunct court doctrines described in *Northern Pipeline*. One, this case arises under a statutory scheme that was enacted for the specific purpose of curing the constitutional problems of the scheme under which *Northern Pipeline* arose. Two, the claim here has been deemed by Congress to involve "core" issues concerning the restructuring of debtor-creditor relations while the claim in *Northern Pipeline* was in the bankrupcty court merely because it was "related to" a case arising under Title 11. In addition, while state law provides the rule of decision in both this case and *Northern Pipeline*, the claim here has a relation to federal law that the claim in *Northern Pipeline* did not have. [8] Here, Congress has exercised its bankruptcy power by assuming control of the private, state-created right of creditors to set aside a fraudulent conveyance and by

vesting that right in the trustee. Thus, even though the right here initially arises from state law, because it pertains to a debor under the protection of federal bankruptcy laws, the right is as dependent for its existence on federal law as it is on state law. [9] And when Congress utilizes a state law right for the purpose of effectuating federal policy, there is no reason why it should not be allowed at least some of the additional discretion in determining the manner in which the right is adjudicated that it is allowed with respect to "purely" federal rights. [10] Finally, it is relevant that this case arises under a scheme in which the non-Article III decision-maker is appointed by Article III judges, whereas *Northern Pipeline* arose under a scheme in which the non-Article III decision-maker was appointed by the President. The appointment of bankruptcy judges by Article III judges provides a substantial degree of separation of power to ensure that federal judges are independent of political pressure from the other branches of government.

COUNSEL

Timothy W. Hoffman, Santa Rosa, California, for the plaintiff-appellee.

Robert L. Pollak, San Francisco, California, for the defendant-appellant.

OPINION

WATERS, Senior District Judge:

This appeal arises from an action filed in a Chapter 7 bankruptcy case by the trustee to avoid, pursuant to 11 U.S.C. § 544(b), an alleged fraudulent conveyance made by the Chaper 7 debtor, Roxanne Mankin ("Mankin"). Named as the defendant in th· trustee's action is G. B.

Munn ("Munn"), the party to whom Mankin made the alleged fraudulent transfer. Two issues have been raised on appeal: (1) whether the trustee's action is a "core proceeding" which Congress intended bankrupcty courts to "hear and determine" pursuant to 28 U.S.C. § 157(b) and, if so (2) whether exercise of jurisdiction by the bankruptcy court is unconstitutional under the holding of the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

28 U.S.C. § 157(a) provides that district courts may refer "cases under title 11 or arising in or related to a case under title 11" to bankruptcy judges. Of the cases referred to them pursuant to 157(a), bankruptcy judges are authorized to "hear and determine" "cases under title 11" and "core proceedings" arising under Title 11, 28 U.S.C.A. § 157(b) (West Supp. 1987). The "cases under title 11" and "core proceedings" heard and determined by bankruptcy judges pursuant to § 157(a) and (b) are subject to review by a district court "in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts." 28 U.S.C.A. § 158(c) (West Supp. 1987). Non-core proceedings related to cases under Title 11 may also be referred to bankruptcy judges pursuant to 28 U.S.C. § 157(a). However, unless the parties stipulate otherwise, bankruptcy judges are authorized only to "hear" non-core proceedings referred to them and then submit proposed findings of fact and conclusions of law to the district court for *de novo* review, 28 U.S.C.A. § 157(c)(1) (West Supp. 1987).

Congress has determined that proceedings to determine, avoid or recover fraudulent conveyances are "core proceedings" which may be referred to bankruptcy judges for determination pursuant to 28 U.S.C. § 157(b). 28

U.S.C.A. § 157(b)(2)(H)(West Supp. 1987). There are two separate provisions in Title 11 which authorize a bankruptcy trustee to avoid conveyances: 11 U.S.C. § 544(b) and 11 U.S.C. § 548. Section 548 specifically authorizes the trustee to avoid any transfer of an interest of the debtor that was "made or incurred on or within one year before the date of the filing of the [bankruptcy] petition" if the debtor "made such transfer . . . with actual intent to hinder, delay or defraud [any creditor]." 11 U.S.C.A. § 548(a)(1)(West 1979 & Supp. 1987). Section 544(b) gives to the trustee the power to avoid any conveyances which an unsecured creditor could have avoided under applicable state law. *See* 11 U.S.C.A. § 544(b)(West 1979 & Supp. 1987). Under California law, unsecured creditors are entitled to set aside fraudulent conveyances made by insolvent debtors. *See* Cal. Civ. Code §§ 3439-3439.11 (West Supp. 1987).

In the present suit, the trustee seeks relief under § 544(b).[1] According to the trustee's complaint, the debtor entered into a written assignment agreement with Munn in which she agreed to transfer to Munn her right

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[1]The trustee chose to seek relief under § 544(b) instead of § 548 probably because of the differing limitation periods governing § 548 and § 544(b). While § 548 governs only conveyances made within one year of the filing of a bankruptcy petition, actions to set aside fraudulent conveyances brought pursuant to California law under § 544(b) are subject only to the three year limitations period of California Code of Civil Procedure § 338(4). The conveyance challenged by the trustee was made on October 11, 1982 while the debtor did not file her bankruptcy petition until October 18, 1983. Thus, because the conveyance at issue here was made more than one but less than three years prior to the filing of the Chapter 7 bankruptcy petition by the debtor, the trustee could, and did, seek relief under California law pursuant to § 544(b) but could not seek relief under the federal fraudulent conveyance provision codified in § 548.

to receive profits as a general partner in Capitola Investors, a limited partnership, in exchange for Munn's promise to co-sign and guarantee a loan needed to refinance real property owned by Capitola. The trustee alleges that the transaction was fraudulent in that Munn's promise to co-sign the loan was not fair consideration, the assignment was made while the debtor was insolvent or rendered her insolvent and the assignment was made with intent to hinder, delay or defraud creditors.

The trustee filed his § 544(b) action in the United States Bankruptcy Court for the Northern District of California on February 1, 1985. Munn responded to the complaint by filing a motion to dismiss. In this motion, Munn asserted the same position which he asserts on this appeal: that under the holding of the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), adjudication by the bankruptcy court of the trustee's action violates Article III of the Constitution. The bankruptcy court accepted this position and by written order granted Munn's motion to dismiss. This order was filed on May 22, 1985 and entered on May 27, 1985. The trustee then filed a motion for reconsideration which the bankruptcy court denied on July 25, 1985. On August 5, 1985, the trustee filed and served a notice of appeal to the district court from the bankruptcy court's order dismissing the complaint.

In ruling on the trustee's appeal, the district court found that the trustee's action was a "core proceeding" as defined in 28 U.S.C. § 157(b)(11) over which the bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(1). The district court also found that the Supreme Court's holding in *Northern Pipeline* did not preclude the bankruptcy court's jurisdiction "because the

right of action arises under Title 11." Accordingly, the district court reversed the order of dismissal and remanded the case to the bankruptcy court with instructions to the bankruptcy court to exercise jurisdiction.

The district court's written order was entered on February 14, 1986. Munn noticed an appeal from this order to this court on March 12, 1986. Although the district court's order authorizes further proceedings, we have jurisdiction under 28 U.S.C. § 158(d) to hear the appeal from the district court's order because the bankruptcy court order appealed from was final. *In re Sambo's Restaurants,* 754 F.2d 811, 813-815 (9th Cir. 1985).

1. *Statutory Jurisdiction of the Bankruptcy Court*

[1] 28 U.S.C. § 157(b)(1) provides for bankruptcy court jurisdiction over core proceedings and 28 U.S.C. § 157(b)(2) lists various types of proceedings deemed by Congress to be core proceedings, Clause (11) of § 157(b)(2) provides that core proceedings include "proceedings to determine, avoid, or recover fraudulent conveyances . . . ." 28 U.S.C.A. § 157(b)(2)(11)(West Supp. 1987). A proceeding under 11 U.S.C. § 548, which specifically authorizes a trustee to set aside fraudulent conveyances made within one year of the filing of a bankruptcy petition, is unquestionably the type of proceeding referred to in § 157(b)(2)(11). Whether § 175(b)(2)(11) refers to state fraudulent conveyance actions is, perhaps, somewhat less clear. The right of a trustee to bring state fraudulent conveyance actions is not specifically mentioned in the federal bankruptcy statutes but rather arises from 11 U.S.C. § 544(b), which allows the trustee to set aside a conveyance which an unsecured creditor could have set aside under state law. Munn argues that in order to avoid the constitutional

question raised by allowing § 157(b)(2) bankruptcy jurisdiction over state fraudulent conveyance actions, we should construe § 157(b)(2)(11) as referring only to the federal fraudulent conveyance action codified in 11 U.S.C. § 548.

[2] We decline to adopt the construction of § 175(b)(2)(11) suggested by Munn. It is true that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *International Ass'n. of Machinists v. Street,* 367 U.S. 740, 749 (1961). By the same token however, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Commodity Futures Trading Comm'n. v. Schor,* __ U.S. __, 106 S.Ct. 3245, 3252 (1986). To construe § 157(b)(2)(11) as being limited to proceedings pursuant to § 548 would be to "ignore the legislative will" underlying the statute. Not only is there nothing in the language of § 157(b)(2)(11) to support Munn's argument, examination of § 157(b)(2)(11)'s context within the Bankruptcy Code, as well as its wording and legislative history, demonstrates that Congress never intended it to be given the restrictive reading that Munn urges.

Section 157(b)(2) does not set categorical limits on the jurisdiction of bankruptcy courts over core proceedings, but rather merely enumerates examples of proceedings falling within a bankruptcy court's core proceeding jurisdiction. That Congress did not intend to limit the bankruptcy courts' jurisdiction over core proceedings by enumerating examples of core proceedings in § 157(b)(2) is apparent from the prefatory language of § 157(b)(2): "Core matters include, *but are not limited to. . . .*" (emphasis added). 28 U.S.C.A. § 157(b)(2)(West Supp. 1987). Thus, in construing a bankruptcy court's jurisdiction over

a particular action pursuant to § 557(b)(1), the crucial consideration is not whether the action falls within one of the clauses of § 157(b)(2), but rather whether the action is or is not in fact a core proceeding. As explained later in this opinion, an action by a trustee pursuant to § 544(b) to set aside a fraudulent conveyance is in fact a core proceeding. *See infra* at pp. 22-23.

[3] Even if the bankruptcy court's §157(b) jurisdiction over this case did turn on construction of § 157(b)(2)(11), we have found no evidence that Congress intended to restrict § 157(b)(2)(11) to federal fraudulent conveyance proceedings. Not only does § 157(b)(2)(11) not distinguish between state and federal fraudulent conveyance proceedings, the federal law of fraudulent conveyance is essentially identical to the law of fraudulent conveyance adopted by the states.[2] Thus, for purposes of § 157(b)(2)(11), state fraudulent conveyance proceedings are distingishable from federal fraudulent conveyance proceedings only by the fact that they are of state origin. Congress has explicitly found that this is a distinction which, standing alone, cannot

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[2]Conveyances made for the purpose of defrauding creditors have long been void at common law. The first major statutory codification of the common law of fraudulent conveyances is that of 13 Elizabeth I Ch. 5 (1570). That statute provided, in substance, that every conveyance made to the end, purpose and intent to hinder, delay or defraud creditors is void. The Uniform Fraudulent Conveyance Act, approved by the National Conference of Commissioners on State Laws in 1918, is essentially a restatement of the statute of 13 Elizabeth. States which have not adopted the Uniform Fraudulent Conveyance Act or a similar version of the statute of 13 Elizabeth have recognized the statute of 13 Elizabeth as part of the common law. 11 U.S.C. § 548 is aimed only at such conveyances as would be fraudulent and voidable under common law or under the statute of 13 Elizabeth, *Coder v. Arts*, 213 U.S. 223, 242-243 (1909) (applying statutory predecessor of 11 U.S.C. § 548.)

serve as the basis for distinguishing core from non-core proceedings: "A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C.A. § 157(b)(3) (West Supp. 1987). In essence then the explicit provisions of the bankruptcy statutes are contrary to the judicial gloss Munn asks us to place on § 157(b)(2)(11).

Finally, we note that Munn's position would contradict the understanding with which Congress enacted § 157(b). As Representative Kastenmeir explained, "the conference report largely rejects the Senate limitations on the tasks which are to be performed by a bankruptcy judge. The report states that a narrow category of cases are [sic] not to be construed as core proceedings." 130 Cong. Rec. H7492 (daily ed. June 29, 1984). Nothing in the legislative history of § 157(b) suggests that Congress enumerated examples of core proceedings in § 157(b)(2) with anything but a view toward expanding the bankruptcy court's jurisdiction to its constitutional limit. *See generally* 9 Bankruptcy Service ch. 81:6-8 (Supp. 1987) (legislative history of the Bankruptcy Amendments and Federal Judgeship Act of 1984); *see also In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1st Cir. 1987) (sponsors of 1984 Act "used arguments strongly suggesting that they were pressing the notion [of core proceedings] to its constitutional bounds"). It is inappropriate therefore to construe one of those examples restrictively in order to avoid a test of what the constitutional limit is.[3]

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[3] *In re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986), does not counsel a different result. There this court held that a bankruptcy court does not have jurisdiction to enter judgment under § 157(b) on a state law counter-claim of a Chapter 11 debtor. In reaching this conclusion, the court commented that a proceeding should not be

II. *Constitutionality of Bankruptcy Court's Jurisdiction*

Article III of the Constitution provides that judges of courts vested with the "judicial Power of the United States" "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. If the requirements of Article III were strictly applied to all cases involving the exercise of federal judicial power, resolution of the constitutional issue in this case would be simple: because the judges of the bankruptcy courts are not guaranteed either lifetime tenure or protection against salary reduction, *see* 28 U.S.C.A. §§ 152(a)(1), (e), 153(a)(West Supp. 1987), their determination of this case would violate Article III. In actuality however resolution of the constitutional issue in this case is not so simple because there have been several instances in which the exercise of federal judicial power by judges without lifetime tenure or protection against salary reduction has been upheld by the Supreme Court under Article III. The

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characterized as "core" if to do so would raise constitutional problems. *Id.* at 162. In *Castlerock* however the court found that the claim at issue did not fall within any of the specific categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) and at most only "arguably" fell within one of the two catch-all provisions of § 157(b)(2). *Id.* Here on the other hand we find that the claim at issue falls within § 157(b)(2)(II), which is one of the specific provisions of § 157(b)(2). While the principle that constitutional problems are to be avoided in the construction of statutes is apt where a catch-all provision is at issue, more apt in construing a specific provision of a statute is the principle that the will of the legislature underlying the provision is not to be ignored. Moreover, in *Castlerock* the court concluded that § 157(b) jurisdiction over the claim at issue would in fact be unconstitutional. 781 F.2d at 162. In this case we find that § 157(b) jurisdiction over the claim here at issue is not unconstitutional.

trustee argues that this is an instance when a non-Article III officer may exercise federal judicial power. Munn of course argues the contrary.

A. *Northern Pipeline and the Subsequent Enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984*

[4] The question of what bankruptcy proceedings can and cannot be committed to the jurisdiction of a non-Article III bankruptcy judge was comprehensively addressed by the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). *Northern Pipeline* involved a state law damages action for breach of contract and warranty filed by a Chapter 11 debtor, Northern Pipeline Construction Company, in a United States Bankruptcy Court. Jurisdiction in the bankruptcy court was premised on § 241(a) of the Bankruptcy Reform Act of 1978 ("1978 Act") which conferred jurisdiction on the bankruptcy court over all "civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C § 1471 (Supp. IV 1976). The defendant, Marathon Pipe Line Company, moved to dismiss the action on the ground that the 1978 Act unconstitutionally conferred Article III judicial power upon judges who lacked life tenure and protection against salary diminution. The Supreme Court agreed with Marathon's position and, in a decision which did not command a majority opinion, affirmed the dismissal of the suit.

[5] Before finding that the bankruptcy court as constituted under the 1978 Act could not constitutionally exercise the jurisdiction conferred on it by the 1978 Act, the plurality opinion in *Northern Pipeline* first considered when and why the Supreme Court had previously made exceptions to the general rule that federal judicial power

is to be exercised only by Article III judges. According to the *Northern Pipeline* plurality, exercise of federal judicial power by a non-Article III officer has been upheld in two types of potentially analogous cases: those involving the adjudication of "public rights" and those in which the non-Article III decision maker acted as an "adjunct" to an Article III court. The plurality concluded that the bankruptcy court jurisdiction at issue violated Article III because it could not be sustained under either the public rights or adjunct court doctrines. However, the concurring opinion did not fully join in the plurality's adjunct court and public rights analysis; a majority of the Justices could only agree that the particular claim before it could not be adjudicated by the bankruptcy court as then constituted. *See Thomas v. Union Carbide Agricultural Products,* 473 U.S. 568, 584 (1985) ("The Court's holding [in *Northern Pipeline*] establishes only that Congress may not vest in a non-Article III court the power to adjudiciate, render final judgment, and issue binding orders in a traditional contract acting arising under state law, without consent of the litigants, and subject only to ordinary appellate review."); *accord Commodities Futures Trading Comm'n. v. Schor,*____ U.S. ____, 106 S.Ct. 3245, 3251 (1986). Subsequent majority holdings of the Supreme Court have recognized that the adjunct court and public rights doctrines embody valid, if not the exclusive, principles governing the determination of when and under what conditions a particular proceeding may be referred to non-Article III officers for adjudication. *See, e.g., Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 588-589 (1985) (majority opinion applying public rights doctrine). We will accordingly consider both the adjunct court and public rights doctrine as explicated by the plurality in *Northern Pipeline* in determining the merit

to Munn's argument that the bankruptcy court's jurisdiction over this proceeding violates Article III.

The public rights doctrine derives from a group of cases in which the Supreme Court has upheld the constitutionality of legislative courts and administrative courts. The doctrine, as construed in *Northern Pipeline,* is limited to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the legislative or executive departments" and which "historically could have been determined exclusively by those departments." *Northern Pipeline,* 458 U.S. at 67-68, *quoting Crowell v. Benson,* 285 U.S. 22, 50 (1932) and *Ex parte Bakelite Corp.,* 279 U.S. 438, 458 (1929). As the plurality explained, "[t]he understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency." 458 U.S. at 68. Pursuant to the public rights doctrine, the Supreme Court has, the plurality found, upheld Congress' establishment of summary procedures, outside of Article III courts, to collect a debt due to the government from one of its customs agents, *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272 (1856), *cited in Northern Pipeline,* 458 U.S. at 68, and has found that the Court of Customs Appeals had been properly constituted by Congress as a legislative court. *Ex parte Bakelite,* 279 U.S. 438, *cited in Northern Pipeline,* 458 U.S. at 68-69.

In *Northern Pipeline,* Northern Pipeline argued that a discharge in bankruptcy was a public right, similar to such congressionally created benefits as "radio station

licenses, pilot licenses, or certificates for common carriers." 458 U.S. at 71. However, because the suit at issue in *Northern Pipeline* was between two private parties concerning only their respective liability under the law, the plurality found it could not be viewed as a public rights suit: "[I]t suffices to observe that a matter of public rights must at a minimum arise 'between the government and others.' [*Ex parte Bakelite,* 279 U.S. at 451, 459.] In contrast, 'the liability of one individual to another under the law as defined,' *Crowell v. Benson,* [285 U.S.] at 51, is a matter of private rights." *Northern Pipeline,* 458 U.S. at 69-70. However, the plurality found that some bankruptcy proceedings *may* fall within the public rights exception: "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be 'public right,' but the latter obviously is not." *Northern Pipeline,* 458 U.S. at 71.

The plurality derived the adjunct court exception to Article III from two cases, *Crowell v. Benson,* 285 U.S. 22 (1932) and *United States v. Raddatz,* 447 U.S. 667 (1980). At issue in *Crowell* was a congressional scheme which empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determination pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. The Commission's "judicial power" was, however, limited in several ways. One, the federal statute administered by the Commission provided for compensation of injured employees "irrespective of fault" and prescribed a fixed and mandatory schedule of compensation. *Crowell,* 285 U.S. at 38, *cited in Northern*

Pipeline, 452 U.S. at 78. As a consequence, the Commission was left with the limited role of determining "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made." *Crowell,* 285 U.S. at 54, *cited in Northern Pipeline,* 458 U.S. at 78. The Court found that in view of these limitations upon the Commission's functions and powers, its determinations were "closely analogous" to those "made, according to familiar practice, by commissioners or assessors." *Crowell,* 285 U.S. at 54, *cited in Northern Pipeline,* 458 U.S. at 78. Observing that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," the Court held that the judicial power exercised by the Commission did not violate Article III. *Crowell,* 285 U.S. at 54, *cited in Northern Pipeline,* 458 U.S. at 78.

The second case upon which the plurality premised its adjunct court exception to Article III, *United States v. Raddatz,* upheld the practice, authorized by the 1978 Federal Magistrates Act, of referring certain pre-trial criminal motions, including motions to suppress based on alleged violations of constitutional rights, to a magistrate for initial determination. According to the *Northern Pipeline* plurality, the *Raddatz* court found that this practice did not run afoul of Article III because two provisions of the Magistrates Act ensured that ultimate decision making authority respecting the pre-trial motions remained with Article III judges: (1) under the Act, the magistrate's proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or call for additional evidence; and (2) the Act specified that the magistrates were appointed,

and subject to removal, by the district court. *Northern Pipeline,* 458 U.S. at 79.

In reviewing *Crowell* and *Raddatz,* the *Northern Pipeline* plurality found that the two cases established two principles relevant in determining the extent to which Congress may constitutionally vest judicial power in adjuncts to Article III courts. One, the plurality found, when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated — including the discretion to assign to an adjunct some functions historically performed by judges. This principle, the plurality found, underlies the result in *Crowell*:

> [I]t is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated. . . . Thus *Crowell* recognized that Art. III does not require "all determinations of fact [to] be made by judges," [citation omitted]; with respect to congressionally created rights, some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar. . . . [citation omitted].

Northern Pipeline, 458 U.S. at 80-81.

The second principle the plurality inferred from the cases is that the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Article III court. This principle, the Court found, was embodied in both *Crowell* and *Raddatz*:

> Thus in upholding the adjunct scheme challenged in *Crowell,* the Court emphasized that "the reservation of full authority to the court to

> deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." [Citation omitted]. And in refusing to invalidate the Magistrates Act at issue in *Raddatz,* the Court stressed that under the congressional scheme " '[t]he authority — and the responsibility — to make an informed, final determination . . . remains with the judge,' " [citation omitted]; the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," [Citation omitted].

Northern Pipeline, 458 U.S. at 81.

In applying the foregoing analysis, the plurality in *Northern Pipeline* found that the first principle — that Congress has greater discretion in prescribing the manner in which rights of its own creation are determined — was of no assistance to Northern Pipeline's position because the lawsuit at issue involved state, and not federally created, rights. "[W]hile *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign fact finding functions to an adjunct created to aid in the adjudication of congressionally created rights, *Crowell* does not support the further proposition . . . that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress." *Northern Pipeline,* 458 U.S. at 81-82. The plurality found this distinction to be of particular constitutional significance because the separation of powers doctrine embodied in Article III is less threatened where the right at issue is congressionally created:

> [The distinction between rights created by Congress and state created rights] seems to us to be

> necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Art. III. The constitutional system of checks and balances is designed to guard against "encroachment or aggrandizement" by Congress at the expense of the other branches of government. [Citation omitted]. But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions . . . are . . . incidental to Congress' power to define the right it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

Northern Pipeline, 458 U.S. at 83-84.

The *Northern Pipeline* plurality also found that the delegation of jurisdiction to the bankruptcy judges under the Bankruptcy Reform Act of 1978 was far greater than the delegations approved in *Crowell* and *Raddatz* and that as a consequence the 1978 Act could not be upheld on the ground that Article III judges retained under the Act

"the essential attributes" of judicial power. In reaching this conclusion, the plurality emphasized that the subject matter jurisdiction of the bankruptcy courts under the Act encompassed not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." *Northern Pipeline,* 458 U.S. at 85 (emphasis in plurality opinion). The plurality also noted that the Act permitted bankruptcy judges to exercise powers "far greater" than those lodged in the adjunct schemes approved in *Crowell* and *Raddatz* in that the Act permitted bankruptcy judges to issue and enforce orders without resort to the district court and allowed for review of bankruptcy court judgments only under a "clearly erroneous" standard. *Id.* at 85-86.

[6] In response to *Northern Pipeline,* Congress enacted the Bankruptcy Amendments and Federal Judgeships Act of 1984 ("1984 Act"). This is the statutory scheme presently in effect and under which the claim here at issue arises. Comparison of the 1984 Act with the 1978 Act, as well as review of the legislative history of the 1984 Act, reveals that in attempting to bring bankruptcy procedures within the limitations of Article III, Congress shaped the 1984 Act with both the public rights and adjunct court doctrines in mind. In apparent response to the distinction made by the *Northern Pipeline* plurality between core bankruptcy proceedings, which "may well be" within the public rights exception, and non-core proceedings, which are not, Congress provided separate procedures in the 1984 Act for adjudication of what are deemed to be "non-core" proceedings. *See supra,* page 2. Whereas the 1978 Act conferred broad powers on bankruptcy courts to determine core and non-core proceedings alike, non-core proceedings can, under the 1984 Act, be referred to bankruptcy judges only for recommended

findings subject to *de novo* review by a district judge. 28 U.S.C.A. § 157(c)(1), (2)(West Supp. 1987). Core proceedings on the other hand are treated no differently than matters referred to bankruptcy judges under the 1978 Act; the decision of the bankruptcy judge is reviewable by an Article III judge only by an appeal governed by the same rules applicable to appeals taken to the courts of appeals from the district courts. 28 U.S.C.A. §§ 157(b)(1), 158(a), (c)(West Supp. 1987). Thus, because Congress has deemed an action by the trustee to set aside fraudulent conveyances as a "core proceeding," 28 U.S.C.A. § 157(b)(2)(11) (West Supp. 1987), the role of the bankruptcy judge in adjudicating the claim at issue here is essentially the same as it would have been under the 1978 Act.

The analysis in *Northern Pipeline* with respect to the adjunct court doctrine finds expression in the portion of the 1984 Act concerning the appointment of the bankruptcy judges. Under the 1978 Act the bankruptcy judges were appointed by the President, with the advice and consent of the Senate, while under the 1978 Act the bankruptcy judges are appointed by the appropriate court of appeals upon recommendation of the Judicial Conference. 28 U.S.C.A. § 152(a)(West Supp. 1987). As noted by the plurality in *Northern Pipeline,* in *Raddatz* the Supreme Court found that referral or pre-trial motions to magistrates under the Magistrates Act of 1978 was constitutional in part because the magistrates were appointed under the Magistrates Act by Article III judges.

B. *Analysis*

[7] There are several distinctions between this case and *Northern Pipeline* which are relevant to the consideration of whether the bankruptcy jurisdiction at issue in

this case comes within either the public rights or adjunct court doctrines described in *Northern Pipeline.* One, this case arises under a different statutory scheme than that which was in effect at the time of *Northern Pipeline.* This is obviously a relevant distinction because, as discussed above, Congress enacted the present statutory scheme for the specific purpose of curing the constitutional problems of the scheme under which *Northern Pipeline* arose. Perhaps more importantly however, the nature of the claim at issue here is significantly different from the nature of the claim at issue in *Northern Pipeline.* The claim at issue here has been deemed by Congress to involve "core" issues concerning the restructuring of debtor-creditor relations while the claim at issue in *Northern Pipeline* was in the bankruptcy court merely because it was "related to" a case arising under Title II. In addition, while it is state law that provides the rule of decision in both this case and *Northern Pipeline,* as will be discussed in greater detail below, the claim in this case has a relation to federal law which the claim at issue in *Northern Pipeline* did not have.

Despite the distinctions between this case and *Northern Pipeline, Northern Pipeline* unquestionably provides an important frame of reference for determining whether the manner prescribed by Congress for adjudicating the bankruptcy proceeding at issue here is acceptable under Article III. However, in determining the constitutional significance of the distinctions between this case and *Northern Pipeline,* we need not decide if this case neatly falls within the *Northern Pipeline* plurality's definitions of either the public rights or the adjunct court doctrines. Although the plurality in *Northern Pipeline* gave separate and alternative application to the public rights doctrine and the adjunct court doctrine when determining whether the bankruptcy jurisdiction there at issue violated Article III, this categorical approach to applying Article II doc-

trines did not then and does not now command the support of a majority of the Justices. *See Northern Pipeline,* 458 U.S. at 91 (Rehnquist, J., concurring) ("[It is not necessary to] decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes. . . ."); *see also Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 584-586 (1985). As the Supreme Court has noted, "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. at 586-587. Accordingly, in determining the amount of judicial involvement required by Article III in this case, our primary concern is not mechanical application of the public rights or adjunct court doctrines, but is rather the determination of whether the rationales underlying those doctrines are applicable in this case to a sufficient degree to satisfy Article III.

Munn argues that the power to set aside fraudulent conveyances is not at the core of the federal bankruptcy power in that *Northern Pipeline* "establishes that actions to bring property into the estate are not . . . integral to the restructuring of debtor-creditor relations." However, Munn's characterizations of the holding of *Northern Pipeline* and the trustee's suit are misleading. It is true that the trustee is, like the debtor in *Northern Pipeline*, seeking to bring property into the estate. However, the trustee here, unlike the debtor in *Northern Pipeline*, is acting pursuant to his duty under federal bankruptcy law to gather property into the estate on the behalf of creditors of the debtor to facilitate the restructuring of creditor-debtor relations. The suit at issue in *Northern Pipeline* on the other hand was not inherently connected to the debtor's bankruptcy. That suit sought to gather assets

into the estate; it did not do so on behalf of creditors nor did it seek to determine or adjust any of the debtor's relations with its creditors.[4] In short, the right at issue here, unlike the right at issue in *Northern Pipeline*, directly relates to the restructuring of debtor-creditor relations and is not merely an action to bring property into the estate. Munn fails to offer, and we do not see, any compelling reason why the congressional determination that this type of suit is a core preceeding should be upset.

Of course the fact that this suit has properly been designated as a core proceeding would not justify the bankruptcy court's jurisdiction over the matter if we were to find that, contrary to the suggestion of the plurality in *Northern Pipeline*, the restructuring of debtor-creditor relations is not a public right. As noted above, the public rights doctrine, as construed by the *Northern Pipeline* plurality, is limited to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the legislative or executive departments" and which "historically could have been determined by those departments." *Northern Pipeline*, 458 U.S. at 67-68, *quoting Crowell v. Benson*, 285 U.S. 22, 50(1932) and *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929).

While the Supreme Court now recognizes that the presence of the government as a party of record is not an

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[4]Moreover, the contract suit in *Northern Pipeline* could have been brought whether or not the plaintiff was bankrupt. A fraudulent conveyance, though, can only exist if the conveyor is insolvent or about to become insolvent, and thus is inextricably tied to the bankruptcy scheme. *See In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983). If a conveyor enjoys good financial health, a conveyance cannot harm its creditors, who would thus have no cause of action to recover transfer.

absolute requirement of the public rights doctrine, *Union Carbide,* 473 U.S. at 586, 598 (majority and concurring opinions), the rights determined in connection with the granting of a discharge in bankruptcy do not fit easily within the *Northern Pipeline* plurality's definition of the public rights doctrine. The administration of a bankrupt's estate has never been committed exclusively to the legislative or executive branches and we would have great difficulty in concluding that it "could have been." Unlike such congressionally created benefits as radio station licenses, pilot licenses or certificates for common carriers, the grant of a discharge in bankruptcy directly alters and often abrogates pre-existing, legally cognizable property rights. It would be foreign to our constitutional system to allow the type of property rights ordinarily possessed by creditors to be determined exclusively by the legislative or executive branches of government. *See International Union v. Keystone Consolidated Industries,* 793 F.2d 810, 817 (7th Cir.), *cert. denied,*_ U.S. _, 107 S.Ct. 403 (1986) (employer's entitlement to waiver of ERISA funding requirements which would abrogate rights in collective bargaining agreement cannot be determined by non-Article III agency).

Nevertheless, we believe the rationale underlying the public rights doctrine has at least some applicability to the proceeding at issue here. The public rights doctrine in large part simply constitutionalizes the historical understanding of what need and need not be committed to Article III officers for determination. *See Commodity Futures Trading Comm'n. v. Schor,* __ U.S.__, 106 S.Ct. 3245, 3258, 3259 (1986) (Article III requirements more strictly applied where matters traditionally tried in Article III courts are at issue); *In re Arnold Print Works, Inc.,* 815 F.2d 165, 169 (1st Cir. 1987). While, as indicated above, it has always been understood that the

property rights of creditors cannot be committed exclusively to the political branches for determination, by the same token it has always been understood that bankruptcy proceedings need not be solely determined by Article III officers. *Arnold,* 815 F.2d at 169. Given the historical understanding of how bankruptcy proceedings are to be determined, we find that adjudication of core bankruptcy proceedings requires less Article III supervision than does adjudication of claims merely "related to" a bankruptcy proceeding. Thus, the fact that Congress has properly designated the claim at issue here as a core proceeding militates in favor of upholding the manner Congress has prescribed for the adjudication of the claim.

We also find that the first principle inferred by the Northern Pipeline plurality from *Crowell* — that Congress has greater discretion in prescribing the manner in which a right of its own creation is determined than it has with respect to rights not of its own making — has application in this case. As related above, in *Northern Pipeline* the plurality found that this principle was not applicable in the case before it because the claim at issue arose from state law. Insofar as the claim at issue here undeniably implicates state law, it is arguable that in this case we too should conclude that a principle concerning determination of congressionally created rights is inapplicable. However, for the reasons set forth below, we believe that the relation the claim at issue here has to federal law is sufficient to entitle Congress to greater discretion in determining how the claim is to be adjudicated than it is allowed with respect to a purely state claim.

[8] Ordinarily of course, creditors' rights, like the creditor's right at issue here, arise from state law. However, the power of the states to create creditors' rights is subordinate to the power of Congress, conferred by Arti-

cle I, § 8, clause 4 of the Constitution, to establish uniform bankruptcy laws. Congress can, and often has, exercised its bankruptcy power to modify, or even abrogate, creditors' rights in the independent federal interest of providing an equitable restructuring or liquidation of a bankrupt's estate. This case involves an instance in which Congress has exercised its bankruptcy power by assuming control of the private, state-created right of creditors to set aside a fraudulent conveyance and vesting that right in the trustee. Thus, even though the right here initially arises from state law, because it pertains to a debtor under the protection of the federal bankruptcy laws, the right is as dependent for its existence on federal law as it is on state law. Indeed the right that is at issue here belongs to the trustee pursuant to federal law, not to a specific creditor under state law.

[9] It is nonetheless arguable that the fact that a creditor's right is subject to the federal bankruptcy power does not mean that that right is actually created by Congress. However, even if this were true, it would not dissuade us from concluding that Congress should have greater discretion in determining the manner of adjudication of the right at issue here than it would have of a purely state based claim. When determining whether a right is of state or federal origin where the issue is if the right must be adjudicated by an Article III judge, the crucial consideration is not which sovereign created the right, but rather whether Congress utilized the right for federal purposes. Where, as was the case in *Northern Pipeline,* Congress authorizes a federal officer to determine a state right which is not directly related to a federal constitutional concern, federalism concerns give rise to the need, arguably recognized in *Northern Pipeline,* to ensure that the state right is adjudicated in accord with the policies the state sought to effectuate in creating

the right. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1052 (7th Cir. 1984) (dissenting opinion); *but see Commodity Futures Trading Comm'n. v. Schor*, __ U.S. __, 106 S.Ct. 3245, 3261 (1986). When, on the other hand, Congress utilizes state law for federal purposes, the paramount concern is federal, not state, policy, even though Congress has chosen state law as a guideline for effectuating federal policy. As a consequence, when Congress utilizes a state law right for the purpose of effectuating federal policy, there is no reason why it should not be allowed at least some of the additional discretion in determining the manner in which the right is adjudicated that it is allowed with respect to "purely" federal rights.

Here it is clear that Congress conferred the right on the trustee to set aside conveyances which could be set aside under state law for the purpose of restructuring debtor-creditor relations pursuant to the federal bankruptcy power.[5] While the rule of decision is supplied by state law, the concern in applying the rule is to effectuate the policy of federal bankruptcy law. The fact that Congress has chosen to look to state law in defining the trustee's rights does not markedly lessen Congress' discretion in determining how those rights are determined.

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[5]It is noteworthy that there is evidence that Congress utilized state law in the 1984 Act with the understanding that it was not preserving state rights but was rather expounding federal rights. "State law rights arising in core bankruptcy proceedings are functionally equivalent to congressionally created rights, because Congress has the power to modify State law rights in bankruptcy proceedings. . . . Indeed, the very purpose of bankruptcy is to modify the rights of the debtors and creditors, and the bankruptcy code authorizes the bankruptcy court to abrogate or modify State-created rights in many ways." 130 *Cong. Rec.* H 1110 (daily ed. March 20, 1984) (statement of Rep. Kastenmeier).

[10] Finally, we find it relevant that this case arises under a scheme in which the non-Article III decision-maker is appointed by Article III judges whereas *Northern Pipeline* arose under a scheme in which the non-Article III decision maker was appointed by the President. The purpose of the lifetime tenure/no salary diminution requirement of Article III is in part to ensure that federal judges are independent of political pressures from the other branches of government. Where the non-Article III officer is appointed by Article III judges, there is less threat that exercise of "judicial power" will be unduly influenced by the executive or legislative branches. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 n.30 (1982) (plurality opinion); *Pacemaker Diagnostic Clinic of America v. Instromedix*, 725 F.2d 537, 543 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984).

Viewing together all the factors present in this case relevant to the determination of what Article III requires, we are satisfied that the manner prescribed by Congress for adjudication of the right at issue here does not violate Article III. Congress has found, and we agree, that this proceeding falls within the core of the federal bankruptcy power. We are not inclined to upset the historically-based presumption that Congress has substantial discretion in determining how core bankruptcy proceedings are to be adjudicated. The fact that the rule of decision in this case is provided by state law does not take away from the fact that this proceeding relates directly to the restructuring of the relationships between a debtor and its creditors which is at the core of the federal bankruptcy power. We also believe that although the right at issue here derives from state law, Congress has utilized the right to effectuate federal policy and that therefore Congress should be allowed some of the additional discretion in determining the manner in which the right is determined that it is

allowed with respect to purely federal rights. Finally, we find it significant that Congress has provided for a substantial degree of separation of power by placing control over the employment of bankruptcy judges exclusively in the hands of Article III judges. The provision concerning the appointment of the bankruptcy judges ensures compliance with Article III to the extent that the right at issue here might not be considered a congressionally created public right.

C. *Conclusion*

The jurisdiction of the bankruptcy court pursuant to 28 U.S.C. § 157(b) does not in this case violate Article III. Accordingly, the order of the district court reversing the bankruptcy court's order of dismissal is AFFIRMED and this case is REMANDED to the bankruptcy court for further proceedings.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 26, 1987, I served the within Petition for Writ of Certiorari in the United States Supreme Court in re: "Roxanne Mankin vs. G. B. Munn", October Term 1987, No. .....;

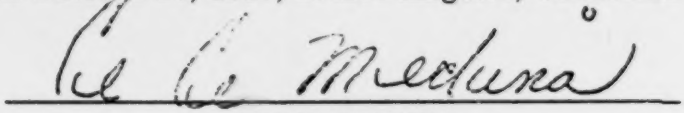
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Hoffman & Hoffman
Harvey W. Hoffman
Timothy W. Hoffman
50 Old Courthouse Square #211
Santa Rosa, CA 95402-3122

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 26, 1987, at Los Angeles, California



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No. 87-711

In The
Supreme Court of the United States
October Term, 1987

In re:

ROXANNE MANKIN, FDBA
THE ROXANNE MANKIN CO, INC.,

Debtor.

G. B. MUNN, aka BRUCE MUNN,

Petitioner,

vs.

CHARLES DUCK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

Congress did not violate Article III of the United States Constitution when it provided bankruptcy courts with jurisdiction to decide fraudulent conveyance actions under 11 U.S.C. Sec. 544(b). Because Congress created the substantive right embodied by Sec. 544(b) it retained a large degree of discretion to determine the manner in which that right is to be adjudicated. That discretion includes the assignment of adjudicatory functions to the bankruptcy courts. In the present case the adjudicatory scheme selected by Congress does not violate the separation of powers doctrine because the bankruptcy courts are adjuncts of the district courts and thereby insulated from the other two branches of government.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

In the case before this Court the Ninth Circuit Court of Appeals decided two issues: first, that a bankruptcy trustee's action to set aside a fraudulent conveyance pursuant to 11 U.S.C. Section 544(b) is a "core proceeding" under the Bankruptcy Amendments And Federal Judgeship Act of 1984 (BAFJA); and, second, that bankruptcy court jurisdiction over a Section 544(b) action is constitutional.

Petitioner has not challenged the first holding. The Ninth Circuit correctly interpreted BAFJA to grant jurisdiction to the bankruptcy courts as broad as possible under the Constitution. Accordingly, the Ninth Circuit refused to draw a distinction between fraudulent conveyance actions brought under Bankruptcy Code Section 548 and those under Section 544(b) where no such distinction had been made by Congress. *In re Mankin,* 823 F.2d 1296, 1300-1301 (9th Cir. 1987).

The second holding raises more complex Constitutional questions. However, the issues raised by petitioner were treated in great detail by the Ninth Circuit and the result is consistent with the prior decisions of this Court and the Constitutional principles underlying those decisions.

The precedent used most often as a guide to the problems of bankruptcy court jurisdiction is *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982). Unfortunately, there was no majority decision in that case and therefore it stands only for the narrow proposition that bankruptcy courts lack jurisdiction to render final judgment in state law contract actions between private parties without the consent of the litigants. *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 584, 105 S.Ct. 3325, 87 L.Ed. 2d 409 (1985); see also *Northern Pipeline,* supra, 102 S.Ct. at 2882 (dissent of Chief Justice Burger) (only a very narrow category of claims fall outside bankruptcy court jurisdiction).

The Ninth Circuit interpreted the *Northern Pipeline* plurality opinion to allow non-Article III courts to ex-

ercise jurisdiction in two types of cases: cases involving "public rights" and cases where the decisionmaker is serving as an adjunct to an Article III court.[1] There were three factors that led the Ninth Circuit to conclude that the Constitution had not been violated in the present case. First, the court noted that when Congress creates a substantive right it retains a large degree of discretion to dictate the manner in which that right is to be adjudicated. Second, the court held that the changes brought about by BAFJA whereby the executive branch no longer plays a role in bankruptcy judge appointments sufficiently insulated the bankruptcy courts to satisfy the principle of separation of powers. Finally, the court felt that it was important to realize that bankruptcy courts have historically exercised jurisdiction over those proceedings that lie at the core of the federal bankruptcy law. The Ninth Circuit's decision was based not on whether the facts fell squarely within one of this Court's prior decisions, for example any of the "public rights" decisions, but, rather, whether the decision was supported by the separation of powers doctrine as enunciated by this Court.

A. When Congress Creates a Substantive Right, It Has a Large Degree of Discretion to Prescribe the Manner In Which That Right Is to Be Adjudicated.

One of the principles important to the issue of bankruptcy court jurisdiction is the principle that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that

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[1] The *Northern Pipeline* plurality also recognizes non-Article III jurisdiction for "territorial courts" and "courts martial". 102 S.Ct. at 2868-69.

right may be adjudicated—including the assignment to an adjunct of some functions historically performed by [Article III] judges". *Northern Pipeline,* supra, 102 S.Ct. at 2876 (plurality opinion). That principle was recently upheld by this Court in *Thomas v. Union Carbide Agricultural Products Co.,* supra. In *Thomas* this Court was faced with deciding the constitutionality of a binding arbitration procedure under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The Court held that the arbitration provision did not violate Article III of the United States Constitution and stated:

> Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.
>
> *Thomas,* supra, 87 L.Ed. 2d at 428.

A brief overview of the role played by a Chapter 7 trustee shows that the right at issue in the present proceedings is such a quasi-public right created by Congressional enactment of the Federal Bankruptcy Code pursuant to Article I, Section 8, Cl. 4 of the United States Constitution. and therefore does not require resolution by an Article III court.

A Chapter 7 bankruptcy trustee is a creature of federal law who is appointed promptly upon the commencement of a Chapter 7 case. 11 U.S.C. Sec. 701. Among the mandatory duties of the trustee is the duty to "collect and reduce to money the property of the estate". 11 U.S.C. Section 704. Collecting those assets which rightfully belong to the estate is not always a simple task. To aid the bankruptcy trustee in his efforts to collect estate assets

the Bankruptcy Code arms him with numerous rights and powers. Among these are: the rights and powers of a lien creditor and as a successor to certain creditors and purchasers, 11 U.S.C. Sec. 544; the power to avoid certain statutory liens, 11 U.S.C. Sec. 545; the power to recover preferential transfers, 11 U.S.C. Sec. 547; the power to recover fraudulent transfers, 11 U.S.C. Secs. 548, 544; and the power to avoid certain post-bankruptcy transfers, 11 U.S.C. sec. 549. By wielding these various rights and powers the Chapter 7 bankruptcy trustee seeks to accomplish the goals of the federal bankruptcy law by rounding up estate assets for an equitable distribution to creditors. This function of the Chapter 7 trustee lies at the "core" of our federal bankruptcy system and is essential to the smooth and speedy administration of Chapter 7 bankruptcy cases.

Petitioner repeatedly argues that this case is no different from *Northern Pipeline* because the trustee is utilizing state law in order to "bring property into the bankruptcy estate."[2] That argument glosses over the fundamental differences between a Chapter 11 debtor-in-possession (*Northern Pipeline*) and the Chapter 7 bankruptcy trustee. It also ignores the historical role of bankruptcy trustees in liquidation cases and the importance of his ability to recover illegitimately transferred assets. When Congress gave these "strong arm" powers to the bankruptcy trustee, it was incorporating state law into federal bankruptcy law. *In re Wright Industries, Inc.*, 93 F.Supp.

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[2] At its most basic level the role of the bankruptcy trustee is to "bring property into the estate" for distribution to creditors. The fact that a trustee seeks to "bring property into the estate" should have no bearing on the Constitutional issues before this Court in the present case.

58, 62 (N.D. Ohio 1950); see also, *In re Consorto Construction Co.*, 212 F.2d 676, 678 (3d Cir. 1954) (trustee's strong arm powers are rights created by the Bankruptcy Act itself); see generally, *Collier On Bankruptcy*, para. 70.49 at p. 596 (14th ed.) (Bankruptcy Act). The leading commentator on the Bankruptcy Code instructs us that this aspect of the law has not been changed by the adoption of the Bankruptcy Reform Act of 1978. *Collier On Bankruptcy*, para. 544.02 at pp. 544-45 (15th ed.). To the extent the Chapter 7 trustee proceeds under Sec. 544(b) to recover fraudulently conveyed assets in order to provide an equitable distribution to creditors, he acts at the direction of Congress in the pursuit of federal goals. Because Congress has utilized state law to achieve federal goals, Congress retains a large degree of discretion to prescribe the manner in which the specific right is to be adjudicated. See *In re Mankin*, supra, at 1309.

B. The Bankruptcy Amendments And Federal Judgeship Act Provides That the District Courts Will Retain the Essential Attributes of Judicial Power.

A second principle important to the issue of bankruptcy court jurisdiction is the principle that there must be limitations imposed on the non-Article III decisionmaker so that " 'the essential attributes' of judicial power are retained in the Art. III court". *Northern Pipeline*, supra, 102 S.Ct. at 2876 (plurality opinion). If this were not the case the adjudicatory scheme would run the risk of violating the separation of powers doctrine.

At the time this Court decided *Northern Pipeline* bankruptcy judges were appointed by the executive branch. Congress changed this with the 1984 enactment of BAFJA.

Bankruptcy judges are now appointed by the judges of the United States courts of appeals and serve as judicial officers of the district courts. 28 U.S.C. Sec. 152(a)(1). Original and exclusive jurisdiction over bankruptcy cases and proceedings lies with the district courts. 28 U.S.C. Sec. 1334(a). The parties have a right to appeal any decisions of the bankruptcy court to the district court. 28 U.S.C. Sec. 158.

BAFJA's movement of the bankruptcy courts back under the wing of the district courts alleviated an important constitutional criticism of the 1978 Bankruptcy Reform Act. See *Northern Pipeline,* supra, 102 S. Ct. at 2876, n. 31. The bankruptcy courts no longer stand alone, independent of the district courts. Accordingly, there is no longer a threat that the principle of separation of powers will be breached by one of the other two branches of government.

CONCLUSION

The subject before this Court involves "one of the most confusing and controversial areas of constitutional law". *Northern Pipeline,* supra, 102 S.Ct. at 2883 (Dissent of Justice White), citing *Glidden Co. v. Zdanok,* 370 U.S. 530, 534, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962) (plurality opinion). Perhaps the best approach to this problem was set forth in the *Thomas* case: "that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III". *Thomas, supra,* 87 L.Ed. 2d at 424. The approach taken

by the Ninth Circuit in this case did just that, and resulted in a decision well within Constitutional bounds.

Congress did not violate Article III of the United States Constitution when it provided bankruptcy courts with jurisdiction to decide fraudulent conveyance actions under 11 U.S.C. Sec. 544(b). Because Congress created the substantive right at issue here, it retained a large degree of discretion to determine the manner in which that right is to be adjudicated. That discretion includes the assignment of adjudicatory functions to the bankruptcy courts. In the present case the adjudicatory scheme selected by Congress does not violate the separation of powers doctrine because the bankruptcy courts are adjuncts of the district courts and thereby insulated from the other two branches of government.

The decision rendered by the Ninth Circuit Court of Appeals in this case is consistent with this Court's prior decisions and does not violate Article III of the Constitution. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted this 17 day of November, 1987.

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